

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 32**

(Hollister, CA)

CHAMBERLAIN'S CHILDREN CENTER

Employer

and

Case 32-RC-5187

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 817

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find that the Employer, a California corporation providing residential care of children in a group home setting, is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent a unit consisting of the Head Special Education Teacher and the Special Education Teacher employed by the Employer in its two classrooms located at its 1850 San Benito Street facility in Hollister, California; excluding all other employees, case managers, guards and supervisors as defined by the Act. The Employer contends that the Head Special Education Teacher and the Special Education Teacher are both statutory supervisors within the meaning of Section 2(11) of the Act and must be excluded from the unit. Alternatively, the Employer contends that the Head Special Education Teacher is a statutory supervisor, and that the petition should therefore be dismissed because the unit would then consist of a single employee (the Special Education Teacher) and could not be certified. The Petitioner contends that those employees are not supervisors under the Act and should be permitted to comprise the unit.

THE EMPLOYER'S OPERATION

The Employer is engaged in the residential treatment of emotionally disturbed children, on a private, non-profit, fee for service basis. The residential treatment program is licensed to serve 24 children at any given time. At its San Benito Street location, the Employer has four licensed group homes, administrative offices, and two classrooms. At its Bosso Road location, the Employer has an emergency shelter, a building for supervised visitation, and exchange services for family court and child protective services. The school

on site at the San Benito Street location is comprised of two classrooms, one that is overseen by Head Special Education Teacher Willie Pearson and the other that is overseen by Special Education Teacher Gregory Smith. Child Care Counselors are assigned to each of the two classrooms. The Employer contracts with various governmental entities, including counties or county education offices and public school districts, to provide services for children that the governmental entities are otherwise unable to serve.

The Head Special Education Teacher position was created in November 2001. At that time, it was contemplated that the Head Special Education Teacher would supervise both the Special Education Teacher and the Child Care Counselor Supervisor positions, and that the Child Care Counselor Supervisor would directly supervise the Child Care Counselors. As of July 1, 2003, the Child Care Counselor Supervisor position was eliminated, and the Head Special Education Teacher assumed direct supervision of the Child Care Counselors working in his classroom. There have historically been either one or no more than two teachers at the site, and there is no evidence in the record of any plans to expand the site or hire additional teachers.

The job description of the Head Special Education Teacher lists the following duties or functions, among others: Provide recommendations to the Assistant Director regarding service improvements; Develop and implement appropriate curriculum; Evaluate student progress in accordance with state and agency standards; Manage all provisions of each assigned student's Individual Education Program (I.E.P.); Assign children to the appropriate classroom; Provide supervision, consultation, and training to program staff regarding special educational needs; Supervise and ensure school compliance with I.E.P. documentation and procedures in accordance with state and county requirements;

Supervise and support the job performance of the Special Education Teacher; and supervise and support the job performance of the Child Care Counselor Supervisor. The performance evaluation of Head Special Education Teacher Pearson further confirms that his responsibilities included the supervision of the Special Education Teacher and the Child Care Counselor Supervisor.¹

ANALYSIS

The Applicable Law

Section 2(11) of the Act defines a supervisor as one who possesses “authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” The possession of any one of these primary indicia of supervisory authority, as specified in Section 2(11) of the Act, regardless of the frequency of their use, is sufficient to establish supervisory status, provided that such authority is exercised in the employer's interest, and requires independent judgment in a manner that is more than routine or clerical. Harborside Healthcare, Inc., 330 NLRB 1334 (2000); Hydro Conduit Corp., 254 NLRB 433, 437 (1981); Queen Mary, 317 NLRB 1303 (1995).

The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. NLRB v. Kentucky River Community Care, 532 U.S. 706, 121 S.Ct. 1861 (2001); Bennett Industries, Inc., 313 NLRB 1363 (1994); Tucson Gas

¹ Among the goals shown for Head Special Education Teacher Pearson during the next evaluation period were to “continue to demonstrate a visible leadership style as the Head Teacher in the School by . . . communicating on a regular basis regarding school needs and concerns through the use of trainings, staffing meetings and memos; improving supervisory relationship and support of the Child Care Counselor Supervisor; providing regularly scheduled supervision and training to the Special Education Teacher.”

and Electric Co., 241 NLRB 181 (1979). To meet this burden the party asserting supervisory status must provide sufficient detailed evidence of the circumstances surrounding the alleged supervisor's decision making process in order to demonstrate that the alleged supervisor was exercising the degree of discretion or independent judgment that is necessary to establish supervisory status. Moreover, it is well settled that the designation of an individual as a supervisor by title in a job description or other documents is insufficient in and of itself to confer supervisory status. Western Union Telegraph Company, 242 NLRB 825 (1979). On the other hand, possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., Arlington Masonry Supply, Inc., 339 NLRB No. 99, slip op. at 3 n.10 (2003); Pepsi Cola Co., 327 NLRB 1062, 1063 (1999); Fred Meyer Alaska, Inc., 334 NLRB No. 94, slip op. at 4 n. 8 (2001). I turn now to the specific indicia.

In this case, it is the Employer who is asserting that the Head Special Education Teacher and Special Education Teacher are supervisors, and therefore it has the burden of establishing the supervisory status of these positions. For the reasons set forth below, I find that the Employer has satisfied its burden as to Head Special Education Teacher Willie Pearson. As I have found Pearson to be a supervisor within the meaning of Section 2(11) of the Act, he is excluded from the unit.

The exclusion of Pearson leaves, at most, only one person in the petitioned for unit. Board law prohibits the certification of a stable one person unit. Roman Catholic Orphan Asylum of San Francisco, 229 NLRB 251 (1977); Sonoma-Marin Publishing Co., 172 NLRB 625 (1968). Therefore, I am dismissing the petition in this case. In these

circumstances, I also find it unnecessary to make a finding regarding the supervisory status of Special Education Teacher Gregory Smith.

Primary Indicia of Supervisory Authority

The Employer takes the position that Head Special Education Teacher Willie Pearson is a statutory supervisor because he has supervisory authority related to the assignment and direction of other employees' work, the evaluation of employee job performance with potential effect on employee pay and promotion opportunities, the approval of employee requests for time off, the disciplining of employees, the adjustment of employee grievances, and the effective recommendation of the hiring of employees. As set forth in more detail below, I find that the Head Special Education Teacher has the authority to transfer or effectively recommend the transfer of employees, to adjust or effectively recommend the adjustment of employee grievances, and to responsibly direct employees' work. I also find that the Head Special Education Teacher uses independent judgment in carrying this authority.² I find that the other asserted grounds for a finding of supervisory status (authority to discipline, authority to evaluate and promote, authority to approve requests for time off, and authority to effectively recommend hiring) lack sufficient legal or factual support in the record, and I do not rely upon them in the course of my finding that the Head Special Education Teacher constitutes a supervisor.

The Adjustment of Employee Grievances

² Accordingly, as the possession of any one of the specific criteria listed in Section 2(11) of the Act is sufficient for a finding of supervisory status, I find it unnecessary, with one exception (the power to discipline), to address in detail the other criteria asserted by the Employer to be indicative of supervisory status.

The Board has consistently applied the principle that the authority to effectively recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. Children's Farm Home, 324 NLRB 61 (1997); Brown & Root, Inc., 314 NLRB 19, 23 (1994). The record in this case reflects that following Child Care Counselor Jason "Jay" Barstow's receipt of a two day unpaid suspension and his attendant removal from the work schedule, Barstow prepared and submitted a written grievance to Pearson seeking reinstatement to the work schedule. After considering Barstow's grievance and meeting with Barstow, and concluding that the discipline was excessive under the circumstances, Pearson had Barstow put back on the work schedule effective May 6, 2003, the same day on which Pearson met with Barstow. While there is evidence that Pearson spoke to Residential Program Assistant Director Cathy Nelson about the situation and about his decision, there is no evidence that Nelson or anyone else conducted any additional investigation or further assessed the situation before Barstow was returned to work. In light of the above, I find that the record supports the conclusion that Pearson either himself adjusted, or effectively recommended the adjustment of Barstow's grievance, thus satisfying one of the Section 2(11) indicia of supervisory status.

The Authority to Transfer Child Care Counselors

The record reflects that shortly before the hearing in this case commenced, Pearson determined that he had an available Child Care Counselor position in his classroom, issued a memorandum to that effect, personally interviewed all interested applicants, and ultimately chose Child Care Counselor Maria Amescua for the position. Pearson's decision necessitated the removal of Amescua from the schedule at the residential or

“cottage” portion of the Employer’s facility so that she could be placed on the school schedule. Pearson admits to having “chosen” and being “involved in making the recommendation” to transfer Amescua. Given the absence of evidence that that any other supervisor or manager made an additional or independent investigation of Amescua’s qualifications or of where Amescua was needed most, I find that the record supports the conclusion that Pearson possesses the power to transfer, or to effectively recommend the transfer of employees from the cottage to the school.

Responsible Direction of Work

It is undisputed that Pearson as Head Special Education Teacher determines when, and occasionally even if, the Child Care Counselors working in his classroom will take their breaks and/or lunches, based on his evaluation of the childrens’ behavior and the overall situation in the classroom at the time. See Third Coast Emergency Physicians, P.A., 330 NLRB 756, 759 (2000) (denying supervisory status in part on basis of lack of evidence that purported supervisors determined lunch and break schedules of employees). Pearson also directs the Child Care Counselors in his classroom to implement the curriculum that he has developed for each student.³

The assignment of tasks in accordance with an employer’s set practice, pattern or parameters, or based on routine or obvious factors, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. Express Messenger Systems, 301

³ While there is evidence that each student’s curriculum must conform or comply with standards imposed by the state or by the counties with whom the Employer contracts, I do not find support in the record for the conclusion that such standards or standard operating procedures so limit or circumscribe the Head Special Education Teacher’s authority or role that his degree of judgment falls below the threshold required to establish statutory supervisory authority. Cf. Dynamic Science, Inc., 334 NLRB No. 57 (2001); Chevron Shipping Co., 317 NLRB 379, 381 (1995). See also American Commercial Barge Lines, 337 NLRB No. 168, slip op. at 2 (2002) (although Coast Guard rules governed posting of lookouts in bad weather or limited visibility, pilots found to be supervisors exercised independent judgment in determining whether and when those conditions were met).

NLRB 651, 654 (1991); Bay Area-Los Angeles Express, 275 NLRB 1063, 1075 (1985).

The Board and federal courts typically consider assignment based on assessment of a worker's skills to require independent judgment and therefore to be supervisory, except where the "matching of skills to requirements [is] essentially routine." Brusco Tug & Barge Co. v. NLRB, 247 F.3d 273, 278 (D.C. Cir. 2001). In this case, it appears that Pearson exercises independent judgment when he decides which Child Care Counselor is the most capable or is best suited to handle a particular student "acting out" or otherwise engaging in misconduct disruptive to the classroom; and when he decides whether a particular Child Care Counselor should remove a particular student from the classroom to go on a walk, how long the Child Care Counselor should remain out of the classroom with the student, etc. I find that the handling of such complex and volatile situations tends to require the exercise of judgment and discretion, and is not akin to the assignment of routine tasks.

In determining whether direction is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs. Children's Farm Home, *supra*; KDFW-TV, Inc., 274 NLRB 1014 (1985). In this regard, I note that there is evidence in the record that Acting CEO Doreen Crumrine will contact Pearson in the event that any of Pearson's subordinates failed to turn in miscellaneous necessary paperwork (e.g., purchase orders, reports, registers of services and students served), and that Pearson will accordingly remind employees of the need to complete such paperwork. The record also reflects that Pearson signs the time sheets of the Child Care Counselors working in his classroom. While there is no evidence in the record that Pearson has ever received any disciplinary warnings on

the basis of any alleged failure to direct and delegate work to subordinates, I nevertheless find that Pearson's testimony, job description and performance evaluation dictate the conclusion that Pearson is held accountable and responsible for the performance and work product of the employees he directs. See Franklin Hospital Medical Center, 337 NLRB No. 132 (2002).

On the basis of the foregoing, I have concluded that the Head Special Education Teacher possesses the authority to responsibly direct the Child Care Counselors in their work, thereby establishing this indicia of supervisory status.⁴

I expressly rely upon the above-stated grounds as the basis for my conclusion that Head Special Education Teacher Pearson is a statutory supervisor. While I cannot find that the evidence conclusively establishes that Pearson also possesses the authority to evaluate/reward or the authority to discipline, I also wish to note the existence of record evidence that suggests that Head Special Education Teacher Pearson possesses such authority as well.

Employee Evaluations and Promotions

When an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. Harborside Healthcare, 330 NLRB 1334 (2000); Beverly

⁴ It is well established that the Regional Director may not make credibility determinations in pre-election representation case proceedings. Whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. The Door, 297 NLRB 601 (1990). For this reason, I make no finding with respect to the conflict in testimony between Pearson and Employer Acting Chief Executive Officer Doreen Crumrine as to whether Pearson has the authority on his own to grant employee requests for time off, and I do not rely upon the alleged ability of Pearson to grant requests for time off as a basis for my finding that he is a supervisor. I note, however, that the Absence Request Forms in the record bear only the signature of Pearson as supervisor and do not bear the signatures of, or signature blocks for the use of, other supervisors or managers. Similarly, I make no finding with respect to the conflict in testimony between Pearson and Crumrine as to whether Pearson has authority on his own to grant employee requests for overtime or to require employees to work overtime.

Health and Rehabilitation Services, Inc., 335 NLRB No. 54 (2001). Conversely, when evaluations performed by employees in putative supervisory jobs will be relied on in making personnel actions such as discharge, retention, or the granting or denying of raises or bonuses, supervisory status will be found. See Bayou Manor Health Care, 311 NLRB 955 (1993); Pine Manor Nursing Center, 270 NLRB 1008, 1009 (1984).

Here, there is evidence showing that Pearson was responsible for preparing evaluations and for approving evaluations written by Child Care Counselor Patrick Ellis. The record in this case includes the performance evaluation of Child Care Counselor Patrick Ellis that was prepared and signed by Pearson. Pearson also testified that he intends to prepare a performance evaluation for Special Education Teacher Gregory Smith in the near future.

There is also evidence that, in his capacity as a second level supervisor, Pearson apparently signed off on first level supervisor Ellis's performance evaluations of Child Care Counselors during the period prior to Ellis's departure on July 1, 2003.⁵ Pearson testified that the evaluations he signed for the Child Care Counselors were based on his observation of their performance in his classroom, and that he participated in the evaluation process of all Child Care Counselors working in his classroom.⁶ There is also uncontradicted evidence that the evaluations prepared or approved by Pearson were used by the Employer. Thus, there is conclusionary, but uncontradicted, testimony that the evaluations of Child Care Counselors signed by Pearson are pre-requisites for the

⁵ Because Ellis is not being replaced, it appears that Pearson will now be preparing and signing performance evaluation of Child Care Counselors working in his classroom in his capacity as direct first level supervisor.

⁶ In fact, Pearson testified that while Ellis may have been the Child Care Counselor's first line supervisor for purposes of preparing their evaluation, the Child Care Counselor's were in fact working under Pearson's supervision for most of the day, thus tacitly suggesting that Pearson was able to utilize his own percipient observations and judgments in the course of reviewing and signing those evaluations on which Pearson is shown as second level supervisor.

Employer to give Child Care Counselors longevity pay increases and play a similar role in the Employer's decisions whether to promote an employee from Child Care Counselor 1 to Child Care Counselor 2 and then to Child Care Counselor 3.

Although the lack of sufficient evidence regarding each step of the appraisal process, and the absence of evidence regarding particular situations in which Pearson's evaluation was relied on to grant or deny an employee's wage increase or promotion, precludes me from finding that the Head Special Education Teacher possesses authority to evaluate, promote or reward employees sufficient to achieve supervisory status,⁷ I do note that this evidence strongly suggests that Pearson has that authority, particularly in conjunction with the evidence regarding his authority in other matters.

Authority to Discipline or Effectively Recommend Discipline of Employees

The record contains abundant evidence of disciplinary citations signed by Pearson in his capacity as a second level supervisor, rather than as a first level direct supervisor. The record does not include sufficient evidence showing the details of Pearson's role in the issuance of these warnings. There are also some disciplinary citations that he signed as a first level supervisor. With respect to those citations, it appears that these were all given to employees for failing to administer the proper medication to a student or for failing to do so at the proper time. The evidence also establishes that issuing warnings in such situations is non-discretionary. Therefore I cannot conclude that the above-described citations signed by Pearson reflect the exercise of a significant degree of independent judgment on the part of Pearson.

⁷ See Children's Farm Home, 324 NLRB 61, 66 (1997) (finding treatment team leaders not to be supervisors in part because of lack of specific evidence that any employee was granted or denied a wage increase on the basis of a treatment team leader's recommendation).

There is also evidence in the record of Pearson disciplining Child Care Counselor Supervisor Ellis and other Child Care Counselors. In particular I note that the evidence shows that Child Care Counselor Olivia Flores received a demotion from Child Care Counselor 3 status to Child Care Counselor 2 status on the basis of several citations executed by Pearson as second level supervisor. There is no evidence in the record that Acting CEO Crumrine or Program Director Matthew Madaus conducted any independent investigation of the circumstances surrounding the recommended demotion of Flores, and Crumrine indicated in conclusionary terms that the decision was made by the lower level supervisor. Therefore, viewed in this light, the demotion of Flores tends to reflect Pearson's authority to discipline or to effectively recommend discipline without additional independent investigation by others. However, there is no compelling evidence in the record that would contradict Pearson's assertion that he exercises no discretion or independent judgment in the course of issuing the type of citations issued to Flores and the evidence regarding Pearson's role in the demotion of Flores is not clear or well developed. Moreover, most of the disciplinary citations in the record reflect employee medication errors not requiring independent judgment on the part of Pearson. In these circumstances, I cannot conclude Pearson's role in disciplining employees is sufficient in and of itself to establish that he is a statutory supervisor.⁸

In sum, I find that the evidence concerning each of the individual indicia set forth above (authority to adjust or effectively recommend the adjustment of employee grievances, authority to transfer or effectively recommend the transfer of Child Care

⁸ While the record reflects that Pearson also has the authority to point out and correct job deficiencies in situations falling short of where discipline is required, the authority to point out deficiencies in job performance does not establish the authority to discipline. Franklin Home Health Agency, 337 NLRB No. 132, slip op. at 5 (2002).

Counselors from the residential portion of the facility to the school portion of the facility, and the authority to responsibly direct the work of employees), and all of the evidence of his authority considered collectively, supports a finding that the Head Special Education Teacher is a supervisor within the meaning of Section 2(11) of the Act.⁹

Secondary Indicia of Supervisory Authority

In addition to the duties described above, I also note the existence of some secondary indicia that support the contention that the Head Special Education Teacher is a statutory supervisor. Secondary indicia of supervisory authority may be relied upon only in a close case where some evidence indicates the existence of primary indicia. See GRB Entertainment, 331 NLRB 320 (2000); Billows Electric Supply, 311 NLRB 878 fn. 2 (1993). I therefore note that the Head Special Education Teacher presently earns a salary more than 50% higher than that of the Special Education Teacher.¹⁰ I also note that if the Head Special Education Teacher were not found to be a supervisor, then there would be no supervisor of the Child Care Counselors in the Head Special Education Teacher's classroom during the school day. In sum, I conclude that the secondary indicia of supervisory authority, considered together, further bolster the conclusion that the Head Special Education Teacher is a supervisor within the meaning of Section 2(11) of the Act.

On the basis of the foregoing, the petition is dismissed.

⁹ The Board has consistently applied the principle that authority to effectively recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. Children's Farm Home, 324 NLRB 61 (1997); Brown & Root, Inc., 314 NLRB 19, 23 (1994). Therefore, despite the uncontradicted evidence that Pearson recommended to Acting Chief Executive Officer Doreen Crumrine that Special Education Teacher Smith be hired, and that he was ultimately hired, there is no evidence in the record that Smith was hired solely on the basis of Pearson's recommendation without any additional investigation or analysis by Crumrine or another manager as to Smith's suitability for the position.

¹⁰ There is evidence in the record that Pearson participated in the negotiations which led to the creation of the Head Special Education Teacher position, and a salary increase for that position, which is attributable to the added supervisory responsibilities.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, DC 20570.

This request must be received by the Board in Washington, D.C., by **October 17, 2003**.

DATED AT Oakland, California this 3d day of October, 2003.

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